

# Indirect Crimes

**Citation for published version:**
Cornford, A 2013, 'Indirect Crimes' Law and Philosophy, vol. 32, no. 4, pp. 485-514. DOI: 10.1007/s10982-012-9148-z

**Digital Object Identifier (DOI):**
10.1007/s10982-012-9148-z



**Document Version:**
Peer reviewed version

**Published In:**
Law and Philosophy

# *Indirect Crimes*

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**Abstract:** Both law and morality routinely distinguish between direct wrongs of causing harm oneself and indirect wrongs of contributing to another's harmful actions. This article asks whether this distinction matters for the purposes of a theory of criminalisation. It argues that, in some respects, the distinction matters less than is often supposed: generally, the potential future actions of others have at least some relevance to what we ought to do. However, it is morally significant that criminal liability for indirect wrongdoing can make our freedom to do valuable things contingent upon others' failure to comply with their moral obligations. This raises substantial concerns of autonomy and fairness that tell against the creation of some – but by no means all – indirect crimes.

## Introduction

Both law and morality routinely distinguish between direct and indirect forms of wrongdoing. Direct wrongdoers are those who do wrong by causing harm themselves; indirect wrongdoers are those who do wrong by contributing to the harmful actions of others. More precisely, an actor, D, directly wrongs another person, V, when D wrongfully harms or risks harming V. D indirectly wrongs V when D wrongfully contributes (or risks contributing) to the actions (or potential actions) of another moral agent, P, who would thereby harm (or risk harming) V.[1]

Whilst direct wrongdoing is paradigmatic within the criminal law, indirect wrongdoing is often also criminalised. The most obvious examples of indirect crimes are general offences of participation in direct crimes, such as offences of complicity and incitement. Complicity

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[1] This usage of 'direct' and 'indirect' is drawn from RA Duff, *Answering for Crime* (Oxford: Hart, 2007), pp. 163-165. Others choose to refer to indirectly caused harm as a type of 'remote' harm: see e.g. AP Simester and A von Hirsch, *Crimes, Harms and Wrongs* (Oxford: Hart, 2011), pp. 79-85. I believe the former terminology to be more helpful, as indirect wrongs may or not be spatially and temporally remote from the relevant ultimate harms.

liability at common law is derivative: it is imposed for, and is contingent upon, the relevant direct crime. In other words, D will only be liable as P's accomplice if P's potential direct crime actually occurs – and if it does occur, then D will be liable for the direct offence, along with P.[2] One can contrast this with newer statutory regimes. English law, for example, now contains statutory offences of assisting and encouraging that operate alongside common law complicity doctrine. Liability for these offences is not derivative: it does not depend on the completion of any direct crime by P. Rather, it is imposed for D's acts of assistance and encouragement themselves, regardless of their outcomes.[3]

In addition to these general provisions, there also exist particular offences of indirect participation in certain kinds of activity. To pick just a couple of examples from English law, consider offences such as encouragement of terrorism[4] and offences related to 'stirring up' racial or religious hatred.[5] We can also conceive of some other offences as targeting indirect wrongdoing in implicit terms: that is, without explicitly identifying the targeted wrong in their definition. For example, offences related to drug-dealing and possession of certain forms of pornographic material are perhaps best justified in terms of the contribution of such conduct to the future harmful actions of others.

Despite their familiarity, comparatively little theoretical attention has been paid to indirect crimes *per se*. Theorists have usually been more interested in the general part doctrines in terms of which indirect liability is typically framed: those of complicity and intervening cause.[6] How might we explain this? Perhaps it is thought that the correct view of these doctrines will tell us all that we need to know about the legitimacy of indirect crimes. One might think, in fact, that this much is implied by the definitions of direct and indirect wrongdoing with which we began. According to these definitions, the difference between direct and indirect wrongs is the difference between causing harm oneself and contributing to the harms caused by another. So the coherence of this distinction will depend (the thought

[2] On common law complicity liability, see *Archbold: Criminal Pleading, Evidence and Practice 2011* (London: Sweet and Maxwell, 2010) ch. 18.III.
[3] Serious Crime Act 2007 ss. 44-46.
[4] Terrorism Act 2006 s. 1.
[5] Public Order Act 1986 parts 3 and 3A.
[6] Many of the more significant contributions to this literature are cited and discussed herein. Others that I do not discuss here include J Dressler, 'Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem', *Hastings Law Journal* 37 (1985): 91- 140; PH Robinson, 'Imputed Criminal Liability', *Yale Law Journal* 93 (1984): 609-676.

goes) on the deeper question of when – and indeed, whether – we ought to say that particular actors caused particular harms.

For example, the common law's approach to causation attaches special importance to the free and voluntary acts of responsible agents.[7] Acts of this sort are thought to have some quality that blocks the attribution of any harms that result from them to earlier actors: to use the legal idiom, they always 'break the chain of causation'.[8] This is not yet to say anything about what this 'special quality' might be. For the moment, though, this is not important: the point is that if the law is justified in holding that voluntary acts break causal chains, then this would also show that it is appropriate to distinguish direct and indirect wrongdoing. In particular, it would show that the law ought to demand special reasons to impute responsibility for ultimate harms to indirect wrongdoers. *Ex hypothesi*, this practice would not ordinarily be legitimate.[9]

Similarly, sceptics about the idea of intervening causation will be led to scepticism about the distinctness of indirect wrongdoing. If we are to distinguish indirect wrongs, then at some point we must identify the special quality that voluntary human acts are supposed to have. For the sceptics, however, attempts to identify this quality will always refer at some point to an intuitive belief in libertarian causal metaphysics: that is, to the idea that voluntary acts are uncaused events. In other words, we will inevitably end up trying to show that voluntary acts are literal, causal 'fresh starts'. Whatever the legal status of such a claim, it is surely false as a matter of fact. Even our least scientific beliefs about human actions admit (even if implicitly) that they are susceptible to the influence of the natural world. Consequently, we should doubt that legal doctrines that recognise indirect wrongdoing are sound. At best, they are useful fictions that tend to track what is truly important: for example, degree of causal contribution.[10]

All of this might seem to suggest that the correct view of intervening causation should be all that structures our normative thinking about indirect crimes. Whether we are sceptical

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[7] SH Kadish, 'Complicity, Cause and Blame: a Study in the Interpretation of Doctrine', *California Law Review* 73 (1985): 323-410.

[8] The classic statement of this view is that of HLA Hart and Tony Honoré in *Causation in the Law*, 2nd ed. (Oxford: Clarendon, 1985).

[9] On the idea of imputation in relation to indirect crimes, see Simester and von Hirsch, *Crimes, Harms and Wrongs*, chs. 4 and 5. See also section I below.

[10] This is a rough statement of Michael Moore's view: see his *Causation and Responsibility* (Oxford: OUP, 2009), chs. 11-13.

about the chain-breaking role of voluntary human acts or take it for granted, we should share the assumption that this is the only material issue. In this article, however, I will argue that this way of approaching indirect crimes fails to tell the whole story. I will show that, whatever our best view of causation turns out to be, distinct considerations will often apply to the law's treatment of indirect wrongs. This does not depend on any claim that voluntary human acts have any inherent causation- or responsibility-altering properties. Rather, it is morally significant that indirect crimes make actors' criminal liability contingent on the potential wrongdoing of others. Whilst this is not always problematic, there are certain classes of indirect crime for which this raises substantial concerns of autonomy and fairness.

Such a view doubtless has implications for the general part doctrines of complicity and intervening causation. I will largely avoid discussing these here, though. My present concern is with an aspect of this topic that has received comparatively little attention: the question of how far the state may go in criminalising indirect wrongdoing.[11] As will already be apparent, it will be impossible to proceed in answering this question without doing at least something to answer the more general question of the significance of intervening action. Hence, I address this question in part I. I will mostly side with the sceptics in arguing that intervening acts do not necessarily alter the responsibilities of earlier actors. As a general matter, the potential future actions of others should have at least some weight in our moral reasoning. Thus, we need not seek special reasons to impute harms to indirect wrongdoers before we may criminalise their conduct.

Nevertheless, we have reason to be cautious about the creation of some kinds of indirect offence. By their very nature, indirect offences make our liberties contingent upon others' tendencies towards wrongful action. This will not seem like much of an objection when the conduct criminalised is intended to contribute to another's wrongdoing, or where the contribution is a side-effect of an action that has no value. But where the contribution targeted is a side-effect of pursuing some valuable goal, it matters that one's freedom to pursue that goal is limited by others' potential moral failure. I illustrate the unfairness of this phenomenon in part II with reference to the (already mentioned) English offence of recklessly encouraging terrorism. Even if we grant that this offence *targets* only wrongful conduct, it will still restrict citizens' liberty to engage in valuable forms of expression. This is difficult to justify

[11] The notable exceptions are Simester and von Hirsch, *Crimes, Harms and Wrongs*, chs. 4 and 5; J Feinberg, *Harm to Others* (Oxford: OUP, 1984) ch. 6.

to citizens: effectively, they are forced to bear some of the cost of preventing wrongdoing that others could avoid simply by complying with their own moral duties.

Of course, this does not establish that we should refrain completely from creating indirect offences. Often, we will have a good *pro tanto* case for criminalising conduct that is indirectly harmful or risky. In part III, I consider some examples of criminal offences that are plausibly justified as targeting indirect wrongdoing. In particular, I consider indirect crimes that are framed in implicit terms: that is, offences that target indirect contribution to an ultimate harm, but that do not identify that harm in their definition. I suggest that offences of this sort are a uniquely appropriate way of dealing with some kinds of indirectly harmful conduct: for example, contribution to sexual exploitation. Once again, though, I also suggest that we have reason to be cautious in employing this kind of rationale for criminalisation. In particular, we should be careful that it is not used to support the criminalisation of conduct whose wrongful or harmful character is elusive, or that needs to be specified in further detail before criminalisation can be shown to be justified.

## I. The Significance of Intervening Action

Why should the law distinguish between direct and indirect wrongs? The strongest reason for it to do so would be that the intervening acts of moral agents have an inherent, special quality that alters the moral responsibilities of earlier actors. According to Sandy Kadish, the law itself assumes that intervening acts have this kind of quality. In his words, there is a

> …pervasive conviction, widely manifested in the law, that it simply matters whether the causal route goes through another person... You may be as culpable as another for the harm the other causes if you exercise your will to participate in his action. Otherwise, what he causes is his doing, not yours... So even if we are prepared to find the helper blameworthy for his reckless contribution to the upshot we are inclined to see his culpability as necessarily less than that of the doer.[12]

[12] SH Kadish, 'Reckless Complicity', *Journal of Criminal Law and Criminology* 87 (1997): 369-394, p. 393. See also his 'Complicity, Cause and Blame'.

This idea doubtless has some intuitive appeal. On reflection, though, it is difficult to see why we should think that intervening action 'simply matters' in the way that the law imagines. Even common-sense conceptions of autonomous agency admit that we can influence one another's actions. Whilst we do not typically experience our own actions as having been caused by external factors, it would be solipsistic to therefore conclude that such factors do not contribute to what we do. Some actions are very obviously triggered by others' contributions: for example, in cases of coercion, persuasion or incitement. But less obviously manipulative conduct can also contribute to how we act. For instance, you might give me a chance to indulge some habit of mine, or draw my attention to some relevant reason to act in a certain way.[13]

Moreover, these claims are compatible with the further claim that our actions in such cases are voluntary. It is intelligible that some action can be a result of others' contributions, as well as of the actor's cognitive and rational processes.[14] To illustrate, imagine that P is considering killing V. D tells P that he ought to do so because V deserves to die. After some deliberation, P decides to kill V – motivated in part by the belief that V deserves to die. Here, P's decision to kill V is surely voluntary. P has chosen this course of action based on his perception of the reasons for action that exist and his judgement about how these reasons should be weighed. However, D convinced P of the existence of one of his reasons to kill V. Had he not done so, some measure of doubt might have remained in P's mind. It follows, we may conclude, both that P's actions were voluntary and that D contributed to them.

Of course, there are difficult philosophical (and scientific) questions lurking here. As we have already seen, it is not universally agreed that external factors can cause human actions in the usual sense. Some people might be tempted to say something like the following about the case just imagined. Assume that one's reasons for action do not cause one's actions.[15] If this is true, then it follows that a person who brings those reasons to one's attention does not causally contribute to the relevant actions either. Hence, if P's belief that V deserves to die does not cause his decision to kill V, then neither does D's encouragement

[13] J Feinberg, 'Causing Voluntary Actions' in his *Doing and Deserving* (Princeton, NJ: Princeton University Press, 1970), pp. 155-158.
[14] Ibid pp. 169-173.
[15] On the relationship between reasons for and causes of action, see D Davidson, 'Actions, Reasons and Causes', *Journal of Philosophy* 60 (1963): 685-700.

to P to form that belief. Counter-intuitively, we should therefore hold that D does not contribute causally to V's death.

Fortunately, we need not take a position on such issues in order to dispute the idea that intervening voluntary actions are special. As others have noticed, indirect wrongs need not be causal in character.[16] To give just one example: actions are often wrong because they impose *risks* of indirect harm. To impose a risk of X requires that one increase the probability that X will occur: that is, it must be the case that one would expect X to occur more frequently under the conditions brought about by the relevant action.[17] This is plainly true of the above case. Even if D has not contributed causally to P's decision to kill V, it is more likely that P will kill V if he is convinced that V deserves to die than if he is not. Thus, whatever we might say about the causal relationship between D's and P's actions, it is straightforward that D has imposed a risk on V. On the basis of the evidence available to D, his actions have resulted in an increased chance of V's (prematurely) dying.

It follows that our actions in such circumstances can also straightforwardly display the kinds of culpability that are usually thought to be necessary for criminal liability. D has evidence in this case that his actions will increase the probability of V's death; hence, this is presumably a risk of which he ought to be aware. If it would also be unjustifiable for him to impose such a risk, then D is negligent in respect of V's death. Similar observations apply if recklessness is the appropriate threshold for criminal culpability. The only difference is that we must assess D's actions according to the facts as he knew or believed them to be. Thus, if D knows that his actions unjustifiably increase the probability of V's death (by increasing the probability that P will kill V), then D recklessly endangers V's life. At least in principle, culpable endangerment of this sort is surely an appropriate target for a criminal offence.

These remarks suggest that the mere fact of intervening action will not necessarily disturb the factors that typically make actions (directly) wrongful. What kind of a difference, then, could indirectness make to our moral responsibilities? Andrew Simester and Andreas von Hirsch have offered the most influential answer to this question to date. For Simester and

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[16] See e.g. Moore, *Causation and Responsibility*, ch. 13.III; C Kutz, 'Causeless Complicity', *Criminal Law and Philosophy* 1 (2007): 289-305.

[17] Wrongs of risking are non-causal in the sense that they do not require causal contribution. It is conceptually possible that one could raise the probability that an indirect harm will occur, even if (for whatever reason) one would not contribute causally to the relevant harmful act. For an introduction to risk and probability theory written for legal audiences, see S Perry, 'Risk, Harm and Responsibility' in D Owen (ed.), *Philosophical Foundations of Tort Law* (Oxford: OUP, 1995).

von Hirsch, indirectness makes a moral difference because we must find special reasons to *impute* ultimate harms to indirect wrongdoers.[18] This conclusion does not rest on any crude metaphysics: Simester and von Hirsch accept that we can contribute in relevant senses to the harmful actions of others, and that the ultimate harms at stake are often either foreseen or foreseeable.[19] They deny, however, that this is even *prima facie* sufficient to establish a moral obligation to avoid indirectly harmful actions. Rather, liberal states should be committed to the idea that autonomous agents are responsible for the consequences of their *own* conduct.[20] Hence, we must be able to produce special reasons why the consequences of other agents' actions may be regarded as the 'proper lookout' of indirect actors before those actors' conduct may be criminalised.[21]

In considering this argument, we should first address a potentially misleading ambiguity in Simester and von Hirsch's statement of their view. As I have just noted, the authors' language sometimes suggests that what is important is that we are only responsible for the consequences of our own actions.[22] But this seems to re-introduce the troublesome idea that causal power can only be attributed to particular actors in a causal chain. We have already seen that Simester and von Hirsch set themselves against this view. Hence, we will do best to re-state their claim as follows: whatever we should say about causation, it is necessary to demonstrate that ultimate harms may fairly be imputed to indirect actors before we may criminalise their conduct. This is because – and they are very clear on *this* point – there is no *prima facie* obligation to avoid indirect harming or risking. To establish such an obligation requires an additional level of 'normative involvement' in the ultimate harm, for which conventional modes of culpability are neither necessary nor sufficient.[23]

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[18] See, most recently, Simester and von Hirsch, *Crimes, Harms and Wrongs*, chs. 4 and 5. Those who have developed and applied their ideas include DJ Baker, 'The Moral Limits of Criminalising Remote Harms', *New Criminal Law Review* 10 (2007): 371-391 and 'Collective Criminalization and the Constitutional Right to Endanger Others', *Criminal Justice Ethics* 28 (2009): 168-200; MM Dempsey, 'Rethinking Wolfenden: Prostitute Use, Criminal Law and Remote Harm', *Criminal Law Review* (2005): 444-455; P Ramsay, 'Preparation Offences, Security Interests, Political Freedom' in RA Duff et al (eds.), *The Structures of Criminal Law* (Oxford: OUP, 2011); S Wallerstein, 'Criminalizing Remote Harm and the Case of Anti-Democratic Activity', *Cardozo Law Review* 28 (2007) 2697-2738.

[19] Simester and von Hirsch, *Crimes, Harms and Wrongs*, pp. 60-61.

[20] Ibid pp. 80-81.

[21] Ibid p. 63.

[22] For example: "it needs to be shown why the prospect of some ultimate harm, perhaps brought about by an independent actor, makes it wrong for the defendant to act as she does" (ibid p. 72); "[P]eople have a fundamental right to be treated as separate individuals, as autonomous moral agents who are distinctively responsible for the consequences of their *own* actions" (ibid pp. 80-81).

[23] Ibid pp. 80-85.

Once the argument is clarified in this way, though, it is unclear how its conclusion is supposed to follow from its premises. It is admitted that there is nothing *naturally* special about indirect wrongdoing. Why, then, does it nevertheless follow that there is something *morally* special? In other words: why is it only wrong culpably to cause or risk harm to others in the absence of intervening action, even though such actions are materially like other events? Simester and von Hirsch gesture towards an answer to this question: the importance of regarding independent actors as autonomous, choosing agents.[24] But without further explanation, it is difficult to see what role this idea can play in their argument. Autonomous agents can, after all, be influenced by external factors. They also have the power to contribute to the actions of others. So how can the mere ability of human actors to choose autonomously invest intervening action with its putative duty-eliminating power?

To illustrate these concerns, consider another example. Imagine that P – a fully autonomous moral agent – comes to D's house one evening. P asks if he can purchase from D the can of white spirit that D (a painter) keeps in her shed. D knows that P probably intends to use the white spirit to burn down his ex-partner V's house. (V left P for a painter, and P is known to have a taste for the dramatic.) D agrees to sell P the spirit. In doing so, she knowingly increases the probability that V's house will be burned down. However, she does not 'normatively involve' herself in P's actions in any way: she does nothing to affirm P's likely intentions. In fact, she is completely indifferent to V's fate. She intends only to make a profit from the sale of the spirit.

Simester and von Hirsch appear to be committed to the view that, in cases like this, D is permitted to contribute to P's potential harmful conduct. But given our observations so far, this requires some explanation. Whether or not D has 'normatively involved' herself in P's actions, she has knowingly increased the probability that V's house will be burned down. What is more, she has done so for the least laudable of motives. It would surely be strange if morality generally permitted agents like D to impose risks of this sort as a side-effect of making a profit, simply because the risk concerned takes the form of an intervening action. Additionally, it is not obvious what difference it should make to this judgement that P is an autonomous agent. To play devil's advocate, one might even argue that treating P as an agent

[24] Ibid pp. 61; 80-81.

capable of forming and executing autonomously chosen plans requires us to take seriously the possibility that D might contribute to this process.

The better view must be that there is, in fact, no general moral permission to contribute to the potential harmful actions of others. Indirect harms and risks are generally relevant to how we ought to act, and as such are capable of grounding moral obligations. If notions of autonomy and choice are relevant at all here, then they must rather be relevant to the *scope* of those obligations. For instance, it may be that extensive obligations in relation to indirect harms would be objectionable because they make our liberties contingent upon the autonomous choices that other agents make.

I postpone discussion of this possibility until the next section. For the moment, let us consider a reply to the above that might be made on Simester and von Hirsch's behalf. This reply concedes the points made so far. It admits that indirect harms and risks are generally relevant to how we ought to act, and that indirect wrongs often display culpability of a materially similar kind to direct crimes. It suggests, however, that we need not attach the same moral 'weight' to the potential consequences of others' actions as to the potential consequences of our own. The account given so far seems to imply that these should (in theory at least) carry equal weight, since intervening actions are not materially different from other natural events. But many find this conclusion counterintuitive. If it is correct, then (the thought goes) we are required to give as much weight to preventing others from doing wrong as to not doing wrong ourselves.[25] This is at odds with our tendency – some would say entitlement or even duty – to give special attention to the actions and events that reflect our own particular moral agency.[26]

For the purposes of this article, it is not necessary to defend the claim that direct and indirect consequences should carry equal weight in our moral reasoning. It will suffice that we have established the weaker claim that indirect consequences generally have *some* impact on what we ought to do. Nevertheless, it is worth noting that there are ways of explaining why intervening action sometimes appears to diminish the moral weight of ultimate harms or risks that are compatible with the views expressed thus far. Consider, for example, what

[25] For further discussion, see J Gardner, 'Complicity and Causality' in his *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: OUP, 2007) pp. 59-64. Note that the account offered here leaves open the possibility that there is a significant difference between causing harm and failing to prevent it.

[26] For a more general exploration of this line of thought, see B Williams, 'A Critique of Utilitarianism' in JJC Smart and B Williams, *Utilitarianism: For and Against* (Cambridge: CUP, 1973).

John Gardner calls *rational efficiency*.[27] Since there are numerous ways in which we are better placed to avoid the potential adverse consequences associated with our own actions than those associated with the actions of others, we are better off giving more attention to the former than to the latter. Most obviously, we each have more control over what we do than over what others do. In turn, the costs of controlling the consequences of others' actions are greater: both material, and in terms of the time and resources that might have been spent on controlling the consequences of our own actions. We are also less likely to be able to foresee the unintended consequences of others' actions than those of our own. Given these facts, we have general reasons to be more concerned with those potential consequences that are attributable to us than those that are attributable to others.

We should also acknowledge that there are often good reasons why intervening action mitigates our *prima facie* duties in relation to ultimate harms. In particular, we should note that one can often escape liability for imposing risks on others if those others could have chosen not to expose *themselves* to the relevant risks. One possible explanation for this is that agents have independent reasons to value being given a choice in such circumstances. If agents are liable for the costs of their choices, for example, then they will tend to make things go best for themselves. Additionally, giving them such choices may be symbolically important in securing their autonomous status. Because having such choices puts agents in a relatively favourable position, they correspondingly have diminished grounds for complaint if they later become liable for the costs that flow from their decisions.[28]

However, we should also note that this kind of account of the influence of other agents' choices on our duties to avoid harm does not support the view that we can generally give a lesser weight to the consequences of others' actions in our moral reasoning. This account is uniquely appealing in its application to prospective victims of risky action: the fact that those victims can choose not to expose themselves to risks makes the imposition of those risks easier to justify *to them*. By contrast, the same cannot be said of risks that are contingent upon the actions of third parties. To return to our earlier encouragement example, imagine that D must justify to V his decision to tell P that V deserves to die. It would be obtuse of D to defend himself on the grounds that V's death would be contingent upon P's choice: V has no

[27] Gardner, 'Complicity and Causality', pp. 64-65.
[28] This 'value of choice' account of responsibility and liability is derived from TM Scanlon's *What We Owe to Each Other* (Cambridge, MA: Harvard University Press, 1998) chs. 6.2-6.3.

reason to value the fact that D has helped to secure P's status as an autonomous agent by allowing P to choose whether to wrong V. As such, this does nothing to answer the charge that D's actions unjustifiably diminished V's chances of avoiding harm. From the point of view of victims, such variations in causal routes are – quite properly – of little significance.[29]

## II. Autonomy, Fairness and Indirect Endangerment

Intervening action, then, is not an inherent moral obstacle to the creation of indirect crimes. Any plausible conception of autonomous agency admits that we are able to contribute to one another's voluntary actions. Moreover, actions can surely be wrongful simply because they are indirectly harmful or risky. As I have already indicated, though, there is more than this to the question of when the state may criminalise indirect wrongdoing. In this section, I argue that the state has reason to be cautious about the creation of some kinds of indirect crimes, because they make citizens' freedom to pursue valuable options contingent upon the potential wrongdoing of others.

### A. Attack, Endangerment and Liberty

In order to explain this idea, it will be helpful to begin by introducing some further terminology. Following Antony Duff, let us distinguish between *attack* and *endangerment* as types of (criminal) wrong. Broadly, the difference between attacks and endangerments is that attacks are intentional wrongs: they are aimed at causing or risking harm. By contrast, the harms and risks that make endangerment wrongful are unintended: they are side-effects of the relevant endangering action.[30] On these definitions, both attack and endangerment can come in direct and indirect varieties. We can say that D *indirectly attacks* V when D acts with the intention to contribute to P's (potentially) harming or risking harm to V. Correspondingly, D *indirectly endangers* V when D contributes to P's actions as an unintended side-effect.

Generally, endangerment offences are more difficult to justify than offences of attacking. One reason for this is that endangerment offences are likely to place greater

[29] See further J Glover, 'It Makes No Difference Whether or Not I Do It', *Aristotelian Society Supplementary Volume* 49 (1975): 171-209, pp. 184-188.
[30] Duff, *Answering for Crime*, ch. 7.

burdens on citizens' freedom to pursue valuable options.[31] By definition, attacks are chosen *because of* their harmful or risky character; as such, the liberty to attack another tends not to be valuable. This inference can only be defeated if the attack is a permissible means by which to pursue some further valuable end: for example, the defence of oneself or others. By contrast, the pursuit of valuable options is *prima facie* compatible with endangerment.[32] The question of whether endangerment amounts to a culpable wrong thus becomes a value judgement about whether the ends being pursued justify the production of the relevant negative side-effects.[33]

This difference is significant for a theory of criminalisation because of the discretion that criminal justice actors possess. All criminal offences effectively grant powers to these actors: they expand the grounds on which officials might exercise their discretion to investigate, arrest, detain, prosecute and so forth, and on which courts might convict and punish. In the case of endangerment offences, however, the scope of the discretion created is particularly broad. This is because endangerment offences inevitably implicate the kind of value judgement just described. Endangerment offences make one's liabilities – not just to criminal conviction and punishment, but also to the coercive effects of the criminal process – contingent upon judgements of the value of one's conduct made by criminal justice actors. Such judgements are inevitably controversial. Additionally, the discretion afforded to some actors within the system is relatively unchecked. As a result, even well-drafted endangerment offences in practice risk restricting citizens' freedoms to pursue valuable ends by acceptable means.[34]

Similar things can be said of the distinction between offences of indirect attacking and indirect endangerment. Consider first indirect attacks. On the above definition, common law complicity is an offence of indirect attacking: at least traditionally, it requires intention to

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[31] On autonomy as the ability to choose amongst valuable options, see J Raz, *The Morality of Freedom* (Oxford: OUP, 1986), chs. 14 and 15. I should state for the record that my employment of this terminology does not imply a commitment to a perfectionist state of the kind that Raz advocates.

[32] Duff, *Answering for Crime*, pp. 149-153.

[33] A helpful analogy can be drawn here with the ethics of war. Determining the permissibility of endangerment is materially similar to determining the acceptable level of 'collateral damage' in wartime: the general possibility of collateral damage itself is not normally sufficient to render an act wrongful. By contrast, intended harms in either context typically require a strong sort of justification, such as self-defence or the avoidance of a greater evil. See J McMahan, *Killing in War* (Oxford: OUP, 2009), pp. 21-22.

[34] For further exploration of the relationship between official discretion and the negative effects of criminalisation, see DN Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford: OUP, 2007) ch. 1.II.

assist or encourage the principal's crime.[35] A note of caution is due here: if D intends to assist or encourage P to harm V, then D does not necessarily intend that V be harmed, *under that description*. Typically, however, D will intend 'to get P to harm V', 'to persuade P to choose to harm V', 'to make it easier for P to harm V' or some other such proposition. Much like direct attacks, actions that are intended to cause indirect effects of these sorts will tend not to be aimed at valuable ends. Thus, the state does comparatively little damage to citizens' valuable freedoms by prohibiting them.

In contrast, indirectness exacerbates the negative impact of endangerment offences on citizens' liberties. By criminalising direct endangerment, the state threatens those liberties simply by exposing them to the effects of official discretion. By criminalising indirect endangerment, however, it also allows other agents' tendencies towards wrongdoing to dictate the extent to which citizens can participate confidently in valuable activities. This raises an additional concern of fairness as to how the relevant liberties are limited. If others can avoid some harm simply by complying with their moral obligations, then (all else being equal) it is surely fair to expect them to bear the costs of such compliance. Thus, by making our liberties contingent upon others' wrongdoing, the state makes us bear some of the cost of others' failure to do their fair share.

As we will see, this is not a decisive argument against the creation of any indirect endangerment offence. Surely the state may sometimes restrict citizens' liberty in the course of preventing others' wrongdoing: for example, almost anyone will endorse some schemes of legal regulation, even though they have this effect. However, seeing the relevant offences in this light helps us to understand why (and when) they seem particularly difficult to justify. It is comparatively easy to justify regulatory schemes that benefit everyone, when their costs to liberty are modest and evenly spread. By contrast, the burdens associated with indirect endangerment offences are great: they are the burdens of criminal liability, and of the coercive effects of the criminal process. Additionally, they are not evenly distributed: by definition, they attach only to certain kinds of activity.[36] This is difficult to defend, particularly when the activity burdened is valuable to society as a whole. In such cases, there are

[35] The interpretation of this requirement in some jurisdictions is now admittedly very loose: see AP Simester, 'The Mental Element in Complicity', *Law Quarterly Review* 122 (2009): 578-601, pp. 583-588.
[36] I thank a reviewer for pushing me to clarify these points.

significant ways in which we can expect criminalisation to make things go worse for everyone.[37]

To illustrate how indirect endangerment offences produce these problems, consider a real-world example of a relatively serious such offence: the previously mentioned English crime of encouraging terrorism. This offence applies to statements that are "likely to be understood by some or all of the members of the public to whom [they are] published as a direct or indirect encouragement or other inducement to them" to commit terrorist acts.[38] A person commits the offence if she publishes such a statement and either intends the addressees of the statement to be so encouraged or is reckless as to their being so encouraged.[39] For our purposes, it is this second, reckless mode of commission that makes this offence interesting and distinctive. Factoring in the English definition of recklessness, a person is guilty of encouragement of terrorism if he publishes a statement of the requisite kind and, first, knows that there is a risk that such publication will encourage terrorism and, second, that it is, in the circumstances known to him, unjustifiable to take that risk.[40]

It is not yet clear what kinds of statement 'encouragement' includes, particularly within the category of 'indirect encouragement'. At the extreme, we might think that it includes any statement that is in fact likely to encourage the audience to whom it is published. At the very least, we must assume that it extends beyond express to implied forms of encouragement. That this must be so is evidenced by the explicit inclusion of 'glorification' of terrorism within the category of indirect encouragement. A statement falls within the scope of the offence if it glorifies terrorism and "members of the public could reasonably be expected to infer that what is being glorified is being glorified as conduct that should be emulated by them in existing circumstances".[41] Generalising from this, we might infer that what is important in determining whether a statement constitutes encouragement is the extent to which the audience will think that they should emulate the conduct concerned.[42]

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[37] Compare this with the more familiar view that indirect endangerment offences are objectionable because they target conduct that is otherwise harmless and lawful: see e.g. Kadish, 'Reckless Complicity', pp. 382-390. As we will see, it is conceivable that criminal prohibitions could target only morally culpable instances of indirect endangerment. However, legislators still have a reason to refrain from criminalising such conduct because of the unfair burdens that doing so would place on participation in valuable activities.

[38] Terrorism Act 2006 s. 1(1).

[39] Terrorism Act 2006 s. 1(2).

[40] *R v G* [2003] UKHL 50 HL.

[41] Terrorism Act 2006 s. 1(3).

[42] For further reflection on these issues, see A Hunt, 'Criminal Prohibitions on Direct and Indirect Encouragement of Terrorism', *Criminal Law Review* (2007): 441-458.

Let us assume for the moment that this understanding of this offence is correct. The following set of facts would therefore fall within it. Imagine D, an independent filmmaker who wishes to address the topical issue of terrorism in her latest work. D makes a film which she intends to give an empathic portrayal of the life of a terrorist and the social forces that lead terrorists to act as they do. Unfortunately, despite her earnestness, D's work is somewhat clumsy. As a result, her portrayal of her protagonist at times seems to glorify his actions. Whilst the majority of the film's audience will not infer that they should emulate the protagonist's crimes, a small minority will view his conduct as heroic. D realises this when viewing the final cut of the film; however, due to the expense involved in making it, she decides to release it anyway. The risk that she thereby imposes, although small, is in fact unjustifiable: the film is not very good, so its benefits do not outweigh the possibility that it will encourage terrorist acts.

Many will think it objectionable that D could be held criminally responsible in these circumstances. But why should they? If D has knowingly imposed an unjustifiable risk that others will be encouraged to commit terrorist acts, what barrier of principle could there be to criminalising her conduct? The above observations provide an answer: that is, that we have good reason to be sceptical about the state's being permitted to restrict this kind of expression. Whilst it may be true that this particular token of expression is of no or negative value, the forms of expression that filmmakers generally engage in are of great positive value to society. This is particularly so when the subject matter of such expression is a controversial one, such as terrorism. In these sensitive areas, it is particularly important that a range of views can be confidently put forward. This ideal is threatened if offences exist that place burdens on this kind of expression. Such offences carry the twin risks that citizens will be deterred from expressing their views, and that state institutions will misuse their powers to deal with tokens of expression that they deem undesirable.

This case also illustrates the potential for unfairness that is inherent in crimes of indirect endangerment. As with other endangerment offences, the offence of recklessly encouraging terrorism places increased burdens on citizens' freedoms to do valuable things (in this case, to engage in valuable forms of expression). Additionally, though, the offence distributes these burdens unfairly. By criminalising conduct like D's in the above case, the state makes filmmakers bear some of the cost of avoiding the harms that terrorists might cause in future – harms that the terrorists could also avoid simply by complying with their

own moral obligations. This is difficult to justify to filmmakers. Since they are participating in an activity that is valuable not only to them, but to society as a whole, they can properly feel that they ought not to bear these costs. Even if we accept that the legislation *targets* only disvaluable tokens of expression, the fact that filmmakers now cannot practise their craft whilst being certain of avoiding criminal liability therefore counts against it.

**B. Liberty and Culpability**

All of this suggests a more precise role for notions of autonomy and choice in limiting the creation of indirect endangerment offences. In short, there are limits to the liberty costs that we may fairly be forced to bear in order to prevent the potential moral failure of other autonomous agents. Nevertheless, as we saw in section I, it surely also remains true that conduct can be (potentially seriously) wrongful because it imposes indirect risks. We might therefore wonder whether there is any legal device by which we might mitigate the unfairly burdensome potential of indirect endangerment crimes.

One possibility is to introduce additional culpability requirements into such offences beyond mere recklessness or negligence. These could function either as offence elements or as defences. For instance, it is a defence to encouragement of terrorism that the defendant did not endorse the relevant encouraging statement. This defence requires firstly that the statement "neither expressed [the defendant's] views nor had his endorsement", and secondly that this was "clear, in all the circumstances of the statement's publication".[43] This defence would probably function to exculpate the filmmaker in our example. Whilst the difference between an apology for an artist's own extreme views and a sympathetic 'investigation' of those views is often difficult to detect, our filmmaker could surely produce sufficient evidence to raise an issue. It is unlikely that the prosecution would then be able to provide sufficiently persuasive evidence that the filmmaker endorsed the sentiments apparently expressed in her film.

Perhaps this defence could also provide a model for a more general way of limiting the scope of indirect endangerment offences. For example, it would be one way of developing Simester and von Hirsch's view, discussed earlier. We saw that, on their account, indirect

[43] Terrorism Act 2006 s. 1(6).

wrongdoing requires a kind of 'normative involvement' in an ultimate harm that goes beyond conventional modes of culpability. Specifically, defendants must "affirm or underwrite" a principal's wrongdoing before they can become liable in respect of it.[44] Such involvement is easily found in cases of intentional assistance or encouragement: advocating wrongdoing is straightforwardly a way of affirming it. In contrast, it is not always present in cases of indirect endangerment. Simester and von Hirsch do not commit to precise definitions of affirming and underwriting, preferring instead to develop specific examples.[45] But we might use the framework established in the offence of encouragement of terrorism as a model. Thus, we could require that offences of indirect endangerment always provide for a defendant's exculpation wherever he does not endorse – which is to say, he does not morally approve of – the actions of the direct wrongdoer.[46]

This solution would in some ways result in an under-inclusive criminal law. Even if it were generally fitting to make criminal liability in this context sensitive to a defendant's attitudes, to require *endorsement* of the principal's actions would be too demanding. This is best illustrated by considering cases involving indirect risks of grave harms or wrongs. For instance, imagine an arms dealer who supplies weapons to a military regime. Imagine further that this regime intends to use the weapons to commit genocide against its own people, and that the supplier is aware of this intention. It may nevertheless be that the arms dealer does not endorse the regime's plans. Indeed, it is perhaps more likely that, in choosing to supply the regime, the dealer simply exhibits an extreme and callous indifference to the potential victims of the genocide. Surely, however, the dealer's conduct is nevertheless worthy of condemnation, whether under domestic or international law.[47]

In other cases, meanwhile, indirect endangerment offences would remain over-inclusive even if they included an endorsement requirement. Imagine, for example, a variation of the filmmaker case in which D does endorse the actions of her protagonist: she believes that, under certain conditions, it is morally permissible for socially disenfranchised groups to use violence against civilians in order to ensure that their voices are heard. Many

[44] Simester and von Hirsch, *Crimes, Harms and Wrongs*, p. 81.
[45] Ibid pp. 81-85.
[46] I am unsure whether Simester and von Hirsch would welcome such a move. They at least suggest that *displays* of endorsement constitute one kind of affirmation: ibid pp. 83-85.
[47] Compare Simester and von Hirsch. Again, what matters for them is whether the supply of material assistance communicates endorsement, and this depends on the primary use of the article supplied: ibid.

will surely disagree with this view. Moreover, they might consider D to be worthy of moral condemnation for endangering lives by propounding it through her film. Nevertheless, it would be coherent both to adopt this position and to deny that D's conduct should be subject to the *state* condemnation inherent in criminalisation. As we have seen, criminalising such conduct would still risk making artistic expression unduly burdensome. One can recognise this even if one finds the views at stake in a particular case unpleasant and extreme.[48]

This suggests that it is mistaken to think that indirect endangerment offences are problematic because they criminalise those who lack objectionable attitudes (such as endorsement) towards ultimate harms. Attitudinal standards might successfully identify at least one kind of aggravated culpability.[49] But as we have seen, it is not a lack of culpability that makes indirect endangerment offences difficult to justify. This is why we are reluctant to criminalise conduct like D's even in our variation of the filmmaker case. Doing so might adversely affect participation in socially valuable activities, even where the particular defendant concerned exhibits a culpable attitude towards the occurrence of the ultimate harm.

We should therefore not expect that additional culpability requirements will mitigate the unfair restrictions of liberty that indirect endangerment offences tend to create. Rather, if we wish to reduce the moral costs of these offences, I suggest that we need to address directly their propensity to restrict valuable freedoms. I assume, however, that we do not wish to leave judgements about the social value of activities to courts. As such, it will be difficult to formulate any legal standard that can play the required limiting role. Accordingly, the best solution available to us is to advocate the *ad hoc* creation of such offences in contexts in which they would not impose unfair burdens.[50] I turn now to consider some cases in which this condition might be satisfied.

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[48] Compare Wallerstein, who doubts that abstract statements of support for an objectionable ideology constitute affirmation of the kind that Simester and von Hirsch demand: 'Criminalizing Remote Harm and the Case of Anti-Democratic Activity', pp. 2725-2732.

[49] On attitude-based culpability standards, see e.g. SH Pillsbury, 'Crimes of Indifference', *Rutgers Law Review* 49 (1996): 105-218; KW Simons, 'Does Punishment for "Culpable Indifference" Simply Punish for Bad Character?', *Buffalo Criminal Law Review* 6 (2002): 219-315.

[50] Kadish also advocates a policy of *ad hoc* legislation in this area: 'Reckless Complicity', p. 384.

## III. Legislating Indirect Crimes

Limiting the creation of indirect endangerment offences to contexts in which they would not unfairly burden valuable activities would have two significant implications. First, generalised offences of indirect endangerment would effectively be ruled out. Consider, for instance, offences prohibiting dangerous forms of expression, such as offences of reckless encouragement. These offences are inherently likely to impose burdens of the relevant kind: as we have seen, they will tend to inhibit valuable forms of expression even when they do not explicitly target them. Similar things can be said of a general offence of recklessly assisting crime. Such an offence would risk placing unfair burdens on those who work in certain lines of business – for example, selling articles with potentially dangerous uses – even when they are not generally reckless in how that business is conducted.

Second, and relatedly, it will often be necessary for more localised indirect offences to take an *implicit* form. As the name suggests, implicit offences are those that target some type of wrongdoing, but that do so without explicitly identifying it in the definition of the offence.[51] A familiar example is the offence of exceeding a speed limit: this offence targets unreasonably risky driving, but does so by employing a 'proxy' standard of maximum permitted speed. As I suggested at the outset, some existing criminal offences are arguably best viewed as implicit offences of indirect endangerment. In other words, they target conduct that imposes a risk that other agents will cause harm (including, perhaps, to themselves), but do not specify this risk in their definition. They therefore include within their scope conduct that does not impose the relevant risk.

As has often been noted, implicit offences are problematic because they provide a poor guide to the judgement of conduct. In particular, they are worrisome because they tend to be over-inclusive: they provide for the condemnation of actions that are not necessarily wrongful.[52] Their justifiability therefore depends on an acknowledgement that the criminal law does not exist solely to guide the judgement of legal actors. It also exists to guide citizens' conduct. Implicit offences can serve the rule of law by providing more effective guidance to citizens than offences framed in explicit terms. Given their tendency towards over-

[51] Again, the terminology is Duff's: *Answering for Crime*, ch. 7.3(a).
[52] See e.g. Duff (ibid); Husak, *Overcriminalization*, ch. 2.IV, Simester and von Hirsch, *Crimes, Harms and Wrongs*, pp. 75-79.

inclusiveness, I suggest that these are the terms in which we must be prepared to justify implicit offences. They are likely to be justifiable only when an implicit definition provides better guidance to actors on complying with the moral obligations underlying the offence than an explicit equivalent.[53]

Bearing all of this in mind, let us consider how the analysis of indirect crimes just presented might enhance our understanding of some more concrete regulatory contexts. I will offer two brief case studies here. The first are crimes of indirect contribution to sexual exploitation, for which indirect endangerment provides a convincing *pro tanto* rationale. The second is the crime of supplying controlled drugs. Whilst the discussion so far lends some support to this offence, I argue that there are many questions that remain to be answered before it can be shown to be justified *qua* crime of indirect endangerment.

**A. Contribution to Sexual Exploitation**

For an example of a strong *pro tanto* case for the creation of an indirect endangerment offence, consider the following case for the criminalisation of prostitute use.[54] One good reason to criminalise such conduct is that those who engage in it often indirectly endanger prostitutes. As a matter of empirical reality, the majority of prostitutes lack full autonomy in their decisions either to enter or continue in prostitution: whether due to coercion or other factors like drug addiction. By contributing to the creation of a market for prostitution, one therefore indirectly imposes a risk that violations of sexual autonomy will occur. It is clear enough that many people who use prostitutes have adequate evidence that their actions carry these risks; as such, they will at least be negligent in respect of them.[55] In addition to this, the liberty costs of prohibiting prostitute use are minimal. Because sexual release can easily be obtained in other ways, the criminalisation of such conduct would not unfairly inhibit either individual autonomy or participation in any socially valuable activity.[56]

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[53] Simester and von Hirsch (ibid).

[54] This case is drawn mainly from Dempsey, 'Rethinking Wolfenden'. Dempsey's account differs from the present one, however, in that she focuses on direct risks of non-consent in particular cases of prostitute use, rather than indirect risks of future coercion.

[55] Of course, one's evidence might also suggest that the prostitute that one is using may be subject to coercion. If the level of coercion of which one has evidence is sufficient to negate the prostitute's freedom to consent, then one is conceivably guilty of rape: see V Tadros, 'No Consent: a Historical Critique of the Actus Reus of Rape', *Edinburgh Law Review* 3 (1999): 317-340, pp. 334-335.

[56] See generally Dempsey, 'Rethinking Wolfenden'.

One may follow the argument to this point. It may not yet be clear, though, why this offence should be framed in implicit terms: that is, why it should target prostitute use *per se*. Would it not suffice to create an offence that explicitly prohibits (say) 'endangering coercion to sexual intercourse', which would rule out liability where defendants have ample evidence that they have not contributed to coercion? The answer is that the contingency on which such an offence would depend – that is, whether or not the alleged victim has in fact been coerced – is very difficult to determine.[57] Certainly, we could create an offence that exempts defendants from liability where they did not have evidence of a risk of coercion, or even (if we were to employ a recklessness standard) when they were not aware of any risk of coercion. But this may ultimately provide a less effective guide to actors on how to comply with their moral obligations regarding others' sexual autonomy than the simple instruction not to use prostitutes.

This is not yet to conclude that an offence of prostitute use would be justifiable, all things considered. It is conceivable that, for example, state regulation of prostitution would provide a less restrictive means of achieving the same preventive ends. Nor is it to conclude that this is the only imaginable case for criminalising prostitute use. Some might observe that, if there is any wrong involved in using prostitutes, we would expect it to be a direct wrong against prostitutes themselves. For example, perhaps using prostitutes displays a culpable attitude towards them. Perhaps it degrades them, or takes advantage of the coercion to which they may be subject.[58] I do not mean to deny these possibilities here. Rather, I simply mean to show that to conceive of prostitute use as an implicitly defined form of indirect endangerment provides a convincing *pro tanto* case for its criminalisation. What is more, it is a particularly appealing case, since it rests on the propensity of such conduct to increase the probability that others will be harmed.

If one accepts this, then one might also seek to justify existing offences on similar grounds. For instance, consider offences that effectively criminalise the viewing of certain forms of pornographic material, such as that depicting children or 'extreme' images.[59] Again,

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[57] Ibid pp. 450-451.

[58] Baker, for example, argues that the wrong involved in such conduct is benefitting from another's wrongdoing: 'The Moral Limits of Criminalising Remote Harms', pp. 387-388.

[59] In English law, see the offences of making indecent photographs of children (Protection of Children Act 1978 s. 1(1)(a); 'making' images includes creating electronic images: s. 7(4A)) and possession of extreme pornography (Criminal Justice and Immigration Act 2008 s. 63).

searching for and viewing such images on the internet creates a market for their production. This in turn increases the probability that producers of this material will exploit those depicted in it, or will coerce others into becoming involved in the future. The justification for an implicit offence in this context is in some ways even clearer than in the context of prostitute use: it is extremely difficult to be sure about the use of coercion in the production of the material that one might encounter on the internet. It may therefore be preferable to advise citizens to avoid this material *per se*, rather than to rely on their own judgements.[60]

A possible response to this line of argument concerns the value of sexual gratification. Thus far, I have assumed that people should be indifferent between the various means of obtaining this. But this could well be false. Assume, for example, that there are some people for whom prostitute use provides the only opportunity for sexual contact with another person. Must such people really be indifferent between prostitute use and means of obtaining sexual gratification that do not involve contact with others? Alternatively, and perhaps more troublingly, consider those who have a sexual preference for children. These people clearly may not act on their preferences in other ways. So is it really true that the freedom to view child pornography is no more valuable to them than sexual gratification obtained by other means?

For the purposes of this enquiry, we should concede at least the possibility that some means of obtaining sexual gratification are more valuable than others. Even so, this has limited force as an objection to the kind of argument just set out. To prohibit particular kinds of conduct that contribute to coercion does not completely eliminate the possibility of achieving sexual gratification: this option remains open to citizens, even though the means of pursuing it are limited. Contrast this with offences prohibiting reckless encouragement, of the kind considered above. By their very nature, these will tend to restrict the freedom to present certain points of view by *any* means. Hence, whatever we should say about controversies of value surrounding sexual behaviour, the liberty costs associated with prohibiting things like prostitute use and the possession of child pornography are relatively modest.

[60] Compare the case for the criminalisation of such conduct outlined in C McGlynn and E Rackley, 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography', *Criminal Law Review* (2007): 677-690. The authors argue that these offences are legitimate even if there is no proven link to coercion. Such a case, however, is much harder to make than the one I suggest here: what might the grounds for criminalising such conduct be if it neither causes nor risks causing any ultimate harm?

**B. Supplying Controlled Drugs**

A similar case might be made for offences prohibiting the supply of controlled drugs.[61] In supplying drugs to others, one often increases the probability that those others will harm themselves: that is, the evidence available to one will often suggest that one can expect those others to harm themselves more frequently than if one had not supplied them. Whilst not all tokens of drug supply impose risks of this sort, it is difficult for dealers to identify precisely the risks that individual tokens of supply will carry. Hence, we might do best to advise dealers not to supply any controlled drugs whatsoever. We might thus conceive of prohibitions on the supply of controlled drugs as implicit offences, targeting the indirect risk of harm to users.

Once again, I do not mean to suggest that this is the only possible rationale for criminalising drug dealing. Neither do I mean to suggest that similar arguments should be applied to the context of drug prohibition regimes as a whole. My present concern is merely with whether supply offences are well-supported as prohibitions on indirect endangerment.[62] An immediate concern here is that these offences will have a greater impact on citizens' valuable liberties than offences targeting indirect contribution to sexual exploitation. Plausibly, there is at least some social value in facilitating the (responsible) enjoyment of drugs that deserves greater protection than sexual gratification: if nothing else, the pleasures associated with particular drugs are not as easily obtained in other ways.

For the moment, however, we need not concentrate on controversial questions about the social value of drug use. There are other ways in which the argument outlined above is lacking in important detail. Most obviously, it ignores an important difference between the supply of drugs and cases such as prostitute use and viewing child pornography: that is, that the targeted risks in the drug supply case are risks that ultimate victims will harm *themselves*. As we saw, the fact that victims have some element of choice as to whether to expose themselves to a risk often mitigates the standard of care that we owe to them. Drug users can choose whether to take the risks associated with the enjoyment of particular substances; hence, their cause for complaint against the suppliers who are partly responsible for exposing them to those risks is diminished. This suggests that criminalisation is not an apt response to

[61] In English law, see Misuse of Drugs Act 1971 s. 4.

[62] For a critical analysis of possible rationales for drug prohibitions, see DN Husak, *Legalize This!* (London: Verso, 2002) ch. 2.

the risks imposed by the supply of drugs. We might instead focus on improving the quality of users' choices: for example, through education and regulation.

Additionally, important questions regarding the legitimacy of criminalisation as a means of preventing the harms associated with controlled drugs remain unanswered on this view. For example, the argument asserts that the act of supply sometimes increases the risk that users will harm themselves. However, it is not yet clear precisely what kinds of harm are at stake here, or how severe they are. The argument also holds that it is necessary to employ an implicit definition in this context, since it is difficult to specify precisely the risks attached to individual tokens of supply. Again, though, it is not obvious that such an offence would truly be the only effective way of guiding dealers in complying with whatever obligations they may have not to endanger users.[63] I make no further comment here on whether these empirical concerns can be satisfactorily addressed. We should note, though, that concerns like these will often be decisive in determining whether implicit, indirect offences can in fact be justified.

These concerns illustrate more general problems with defining indirect endangerment in implicit terms. By definition, those offences that might be viewed in this way make no explicit reference to the ultimate wrong that they target. Additionally, the putatively wrongful character of such conduct depends on the behaviour of other agents. Because they have these features, it will often be unclear precisely what ultimate harm or wrong an (allegedly) implicit and indirect offence is intended to target. Correspondingly, there is a risk that this kind of argument will be used to justify the criminalisation of conduct whose culpable character is elusive. As Doug Husak highlights, this has worrying implications. It becomes difficult to debate the legitimacy of an offence if one is not clear about the kind of wrongdoing that it supposedly targets. This leads him to suggest that, for any such offence, legislators should at least be required to establish and specify an empirical link between the conduct prohibited and the harm targeted. He believes, in fact, that this condition would have a greater practical impact than any other on constraining the scope of the criminal law.[64]

[63] For further exploration of such concerns, see Husak, *Overcriminalization*, pp. 146-151.
[64] Ibid ch. 3, especially at p. 145 and onwards.

**C. Accounting for Accumulative Harms**

So far, we have been considering cases in which one agent commits a wrong by contributing to the actions of another agent. But there are other kinds of wrongdoing that might also be characterised as 'indirect', in the sense that they depend on others' behaviour. In particular, we should account for what Joel Feinberg calls 'accumulative harms': that is, those harms that occur only if a sufficient number of individuals contribute to them. Feinberg's preferred examples of such harms are the grave environmental harms associated with the gradual build-up of pollution.[65] But we might also characterise some of the harms considered in this section as accumulative. For example, whilst it may be difficult to prove that particular tokens of viewing child pornography contribute to the exploitation of children, we can be certain that exploitation is the cumulative result of such actions.

The challenge that we face in criminalising contributions to accumulative harms is how we ought to explain their wrongness and culpability. Sometimes, what appear at first glance to be contributions to accumulative harms can turn out, on reflection, to be actions that are trivially or imperceptibly harmful.[66] In these cases, we might think that the criminal law faces no special difficulties: we must simply decide whether it is worth criminalising such trivially harmful conduct, given the costs of doing so. In other cases, meanwhile, it seems as though individual contributing acts make no difference to the occurrence of the relevant harm. Such cases have proved as much of a puzzle for moral philosophers as they have for criminal lawyers. Some suggest that we can only make sense of them by holding the group of contributors jointly responsible for the harm.[67] Others, meanwhile, deny that such joint responsibility is possible: logically, there must always be particular actors within the group who make a difference to the harm's occurrence.[68]

Either way, this kind of wrongdoing poses questions that are distinct from those that I have been considering here. I mention it mainly to highlight the fact that it requires further, separate analysis. It is worth noting, though, that nothing said so far supports Feinberg's view

[65] Feinberg, *Harm to Others*, pp. 225-232.
[66] Glover, 'It Makes No Difference Whether or Not I Do It', pp. 172-176.
[67] D Parfit, *Reasons and Persons* (Oxford: OUP, 1986), ch. 3.
[68] See e.g. Shelly Kagan, who believes that ostensibly accumulative harms are always 'triggered' by individual actions. On this view, the wrong of contributing to such harms is that one risks that one will perform the triggering action: 'Do I Make a Difference?', *Philosophy and Public Affairs* 39 (2011): 105-141.

that to criminalise contributions to accumulative harms is necessarily illegitimate. Because contributing acts might be harmless in themselves, Feinberg argues that the criminal law ought not to prohibit them directly: at most, it should be employed to enforce non-criminal regulatory schemes.[69] By contrast, I hope to have shown that the mere fact that an action is not directly harmful is not necessarily fatal to its criminalisation. It may be that we have strong reason to criminalise contribution to (say) the creation of a market for child pornography, without any countervailing concerns of autonomy and fairness. In this case, to criminalise such conduct is appropriate in principle, even if there turn out to be further concerns that ultimately tell against doing so.

## Conclusions

Indirect wrongdoing should be treated distinctly within a theory of criminalisation. This is not due, however, to any inherent quality of free and voluntary human actions that alters the moral responsibilities of earlier actors. Generally speaking, autonomous agents have the capacity to influence one another, and this has at least some impact on what we ought to do. Rather, the uniquely problematic tendencies of indirect crimes arise from the fact that they make criminal liability contingent upon the potential future wrongdoing of others. In particular, indirect endangerment offences sometimes allow others' failures to comply with their moral obligations to restrict an agent's freedom to do valuable things. This is not true in all cases: all else being equal, the state may criminalise indirect endangerment where doing so would not damage valuable freedoms. However, we should be careful that this rationale is not used to support the criminalisation of contributions to elusive or ill-defined ultimate harms and wrongs.

[69] Feinberg, *Harm to Others*, pp. 227-232.